January 19. 1730.

INFORMATION

FOR

K Fraser (5.)

SIMON Lord FRASER of LOVAT,

AGAINST

HUGH MACKENZIE, Esq;

SIMON Lord *Fraser* of *Lovat*, Granchild of *Hugh* Lord *Fraser* of *Lovat*, is the undoubted Heir-male of that Family; and by a Charter in the Records, dated in the Year 1539, it appears that the Lordship or Barony of *Lovat* was limited to Heirs-male; which failing, to Heirs whatsoever.

Though 'tis probable there were on Record Charters of more ancient Date, by which the Succeſſion of that Noble Family was ſettled, long prior to that Period; yet none more early is now to be found; theſe Records having ſuffered by the inteſtine Commotions and Confuſions of the Kingdom, and from the Want of due Care of preſerving them entire.

The Infeftments of the Lordſhip and Eſtate of *Lovat* ſtood limited to the Heirs-male, from that Time downward, in all the Charters granted by the Crown, until *Hugh* the late Lord *Fraſer* of *Lovat*, in his Contract of Marriage with the Lady *Emilia Murray*, Daughter to the late Marquis of *Athole*, put himſelf under an Obligation to provide the Eſtate, failing of Iſſue-male of the Marriage, to the Heirs whatſoever.

The ſaid *Hugh* Lord *Fraſer* of *Lovat* never made up any direct Title to the Eſtate, by Service, nor was he infeft in the Lands; but having acquired an Incumbrance by appriſing for a ſmall Sum, a Reſignation was made, by certain Truſtees, who held it for his Behoof, and a Charter was taken upon their Reſignation, in the Year 1694, in favours of the ſaid *Hugh* Lord *Fraſer* of *Lovat*, and the Heirs-male of his Body, procreate betwixt him and Lady *Emilia Murray* his Spouſe; which failing, to his Heirs and Aſſignees whatſoever.

The ſaid *Hugh* Lord *Lovat* was prevailed on to give Way to this Device in Law, when unacquainted with the Tenor of his former Inveſtitures: But, ſoon after, convinced of his Error, and the Injury done to his own Family, he, in the Year 1696, executed a Deed, in favours of *Thomas Fraſer* of *Beaufort*, his Granduncle, Father to the ſaid *Simon* Lord *Fraſer*

Fraſer of *Lovat*, upon the Failzie of Iſſue-male of the Marriage, and reſtored the Succeſſion to the ancient Channel of the Heirs-male.

Of the Marriage betwixt the ſaid *Hugh* Lord *Lovat*, and the ſaid Lady *Emilia Murray*, there was no male Iſſue; the eldeſt Daughter intermarried with Mr *Mackenzie*, Son to Mr *Roderick Mackenzie* of *Preſtonhall*, one of the Lords of Seſſion, who acquired Debts of the Family, adjudged the Lands, and procuring himſelf infeft, as abſolute Proprietor, made an Entail of the Eſtate, in favours of the Iſſue of his Son by the Defender's Mother.

In this Manner was the Heir-male entirely debarred from the Poſſeſſion of the Eſtate: Nor did this ſeem to be all that was intended; for, to diveſt him likewiſe of the Honours of the Family, if poſſible, a Claim was ſet up by the Heir-female to them; and, in his Abſence, a Decreet was obtained before the Lords of Seſſion, without any Proof brought, finding and declaring, That the Honours of the Family of *Lovat* did belong to her, as the eldeſt Heir-female of the deceaſed *Hugh* Lord *Lovat*, who died without Iſſue-male.

The ſaid *Simon* Lord *Fraſer* of *Lovat* remained for many Years abroad; and this Decreet ſtood unreduced; but returning, and from the Bounty of his preſent moſt gracious Majeſty, (then Regent in the Abſence of his late Majeſty) having, in the Year 1716, obtained a Gift of the Liferent-eſcheat of Mr *Mackenzie* of *Fraſerdale*, the Huſband of the eldeſt Daughter of the ſaid deceaſed *Hugh* Lord *Fraſer*, and who had for Life the Rents and Profits of the Eſtate of *Lovat*, by his Father's Entail, his Lordſhip, to take away all Pretence to the Honours in the ſaid Mr *Mackenzie*, which could not poſſibly be carried off with the Eſtate by Incumbrances, was adviſed to intent a Reduction of this Decreet in Abſence,

ſence; in which he prevailed; but was put to diſpute his Right to the Title and Dignity of his Anceſtors with the ſaid *Hugh Mackenzie*, Eſq; in right of his Mother, who obtained the ſaid Decreet.

It is unneceſſary to trouble the Lords at preſent with reſuming all the Steps of this Proceſs; it may ſuffice to obſerve, that the contending Parties have at ſeveral Times, and at great Length, been heard, and Informations are now ordained to be given in.

Before ſtating the Queſtion, with the Arguments and Anſwers of either Side, the ſaid *Simon* Lord *Lovat* begs Leave to obſerve, that however the Procurators who appear for his contending Party, were pleaſed, in order to move Compaſſion, to touch upon the Misfortunes, and preſent narrow Circumſtances of their Client, as flowing from him; yet he apprehends, that the Reflection meant, is without all Manner of Foundation. His Anceſtors Eſtate was carried off by Incumbrances ſought out, and acquired for that Purpoſe by Mr *Mackenzie* of *Preſtonhall*, the Defender's Grandfather, a Purchaſe not very favourable in the Law of any Country; and therefore if his Lordſhip endeavoured to prevent the ſinking of his Family, it was a Duty incumbent upon him; and at the ſame time, he can appeal to Perſons of great Honour and Integrity, and whoſe Teſtimony cannot be called in queſtion, that he was willing, nay even deſirous, to have made the Misfortune complained of eaſy for the Defender, and to have agreed to Terms and Conditions, that by the Defender's own Relations, of whoſe good Will he could have no doubt, were thought reaſonable, and that ought to have been complied with.

To put the preſent Queſtion concerning the Dignity in

a proper Light, it ſeems neceſſary, in the firſt place, to obſerve, That by no Writing, Grant, or Record, does it certainly appear in what Year the Dignity of Lord was conferred upon the Family of *Lovat*. But this is plain, that the Lord of *Lovat* is marked in the Rolls of Parliament, as having a Seat there, in the Year 1540, and not more early; which is the Year immediately following that, wherein, by the firſt Charter on Record, the Eſtate ſtands limited to the Heirs-male.

The Caſe ſtanding thus, the Heir-general contends, that a Peerage, not by Patent, and which ſtands limited to no particular Set of Heirs, is deſcendible to the Heirs-general. On the other hand, the Heir-male inſiſts, and he hopes with great Juſtice, that by the Law of *Scotland*, the Title of Lord Baron, by the ancient Method of *Creation*, and not by *Patent*, devolves upon him, when it does not appear that, by the Will of the Sovereign, the Fountain of Honour, it was to deſcend in another Channel. And in order to the Determination of this Queſtion, it ſeems proper, in the *firſt* place, to conſider the Nature and Creation of Lord Barons in *Scotland*, and the Alteration that happened in the Reign of *James* I. by the Addition of that new Dignity of Lords of Parliament, or Banrents, to ſuch of the old *Barons* or *Lairds*, as the Sovereign was pleaſed to inveſt with that Honour: And, in the *ſecond* place, the Law, by which the Deſcent of that parliamentary Dignity was, and is to be determined: And, in the *third* place, to run thorow the Inſtances that may be found in the Records, or in Hiſtory, that may give Light, or have Influence on the Judgment in this Caſe; and, by the Way, to anſwer the Exceptions taken to the Rules, by which *Simon* Lord *Fraſer* of *Lovat* avers this Right of Inheritance is to be determined.

Upon the firſt Point, it is to be obſerved, that before the Reign of King *Robert* the *Bruce*, which began in the Year 1306, what the Conſtitution of Parliament was, cannot with ſo great Accuracy be proved: Nevertheleſs there are Remains which afford ſome Light even in that Matter. The Laws of King *Malcolm* II. [a], who reigned from the Year 1004, tell us, That he diſtributed all the Lands in Scotland to his Vaſſals, retaining no Property to himſelf, beſides the regal Dignity, and the *Mute-hill* of *Scoon*, where his Barons [b], for the Support of the King, *conceſſerunt Wardam et Releviam cujuſcunque baronis defuncti*; though, from our Hiſtorians, it would ſeem that a great Part of the Lands of *Scotland* had, before that Time, been given off by *Kenneth* II. And it is much more than probable, that before the Reign of King *Malcolm*, there were in *Scotland* both Earls and Barons, diſtinguiſhed by the Juriſdiction Earls and Barons had, and not by having a Seat in Parliament, which it is probable they had in common with all the other Freeholders, before the Reign of King *Robert* the *Bruce*, as they certainly had after, till the Period, when the Conſtitution of Parliament ſuffered an Alteration, afterwards more particularly to be obſerved.

[a] Leg. Malcol. cap. 1. Dominus Rex Malcolumbus dedit et diſtribuit totam terram regni Scotiæ homi nibus ſuis.

[b] § 3. ejuſd.

The learned *Skene*, in his Obſervations upon theſe Laws of King *Malcolm*, explains the Word *Baron*, to be a Vaſſal who holds immediately of the King by military Service, and had the Power of Pit and Gallows, Infang-thief and Outfang-thief; though at the ſame time, he ſays, it is taken in ſome Inſtances in a larger Senſe, for any Freeholder. And this Juriſdiction ſeems at that Time to have been granted by Charter, as appears from the Books of the Majeſty [c], where it is ſaid, that certain Pleas belong to the Courts of the Barons, Earls, Biſhops, Abbots, and other Freeholders, who have their proper Courts, according to the Form and Tenor of their Charters.

[c] Lib. 1. cap. 4. § 1. et 2.

In

In the Reign of King *William*, which began in the Year 1165, above 100 Years after *Malcolm* II. the Parliament is called the *Conſilium Regis* [a]; and in the Reign of *Alexander* his Son, it is called *Commune concilium Comitum*; and it is the King *& Principes qui conſtituunt* [b], which was a general Name for the *Proceres*, that in the ſame Reign are explained to be the Biſhops, Abbots, Earls, Barons, and *probi homines Scotiæ*; by whoſe Advice and Conſent the Laws are then ſaid to have been enacted [c]; and by a general Deſignation they are called *Magnates Scotiæ* [d].

[a] Statut. ſive aſſiſſæ Regis Willielmi, cap. 1.
[b] Statut. Alexand. cap. 1. § 1. et 2.
[c] Ejuſd. cap. 2. § 1.
[d] Cap. 3.

In the ſame Manner, in the firſt Parliament held by King *Robert* the *Bruce*, there is marked as preſent, The Biſhops, Abbots, Earls, Barons, *& alii magnati* [e]; and ſo that Matter ſtood until the Return of King *James* I. of *Scotland* from his Captivity in *England*, for above 120 Years. And that it did ſo continue is plain from the Act of Parliament *anno* 1425 [f], by which all Prelates, Earls, Barons and *Freeholders* of the King within the Realm, are ordained to appear in Perſon in the King's Parliament and General Council, and not by their Procurator, unleſs he is able to alledge, and prove a lawful Cauſe of Abſence, becauſe they are bound to be preſent in the Parliament.

[e] Statut. Roberti I.
[f] K. Ja. I. parl. 3. cap. 52.

If one can venture to offer a Conjecture in Matters at ſo great a Diſtance, it does not ſeem improbable, that this laſt Act of Parliament was made with an Intention to make way for the Alteration that King probably had in View, from his Return to *Scotland*, to increaſe his own Power in Parliament, by defeating, or at leaſt leſſening the territorial Right of ſitting in Parliament, which all the Barons and Freeholders then had by the Conſtitution; well knowing, that the leſſer Barons and Freeholders, who had not large

large Eſtates, would find it an Expence and Trouble too great for them to be obliged to conſtant Attendance upon Parliaments, and thereby be the more eaſily prevailed upon to part with their Right, which was made troubleſome to them.

It is certain, that when he returned he found the Kingdom in the greateſt Diſorder, from what had happened under the weak Government of *Robert* III. And during his own Captivity, Duke *Murdoch*, who was Governor, had put his own Friends in great Poſſeſſions, which made them formidable in Parliament, as well as in other reſpects: and the Duke himſelf, and his Sons, and the Earls of *Lennox*, *March*, *Douglas* and *Angus*, and moſt of the powerful Men in the Kingdom, he afterwards arreſted and impriſoned, and partly put to Death, and forfeited; which doubtleſs prevailed upon him to endeavour to model the Parliament after another Manner, by creating honorary *Barons* or *Banrents*, and ſubjecting all the other Barons and Freeholders to content themſelves with ſending Commiſſioners; and for that End, in the Year 1427, by Act of Parliament, the ſmall Barons and free Tenants were allowed not to come to Parliaments nor General Councils, providing that from each Sheriffdom two or more wiſe Men, according to the Extent of the Shire, ſhould be choſen Commiſſaries; but all the Biſhops, Abbots, Priors, Earls, Lords of Parliament, and *Banrents*, were to be ſummoned to Council and Parliament by ſpecial Precept.

As the Alteration intended was great, and the Troubles of the Kingdom made it neceſſary for the King not to make too wide Steps, though mention was made in that Act of ſmall Barons, yet in it was no Deſcription by which the Great could be diſtinguiſhed from the Small; nor indeed was this Diſtinction aſcertained at any Time in that King's Reign; neither is there

there any expreſs Bar put upon any of the Barons or Freeholders from ſitting in Parliament, only it is ordained, *That the ſmall Barons and free Tenants need not come to Parliament, nor General Council*, if Commiſſioners were choſen and ſent as there directed. But this Regulation did not take Effect; for though Lords of Parliament, an Order then introduced, were created by that King, yet the Barons, by Tenure, kept their Seat in Parliament. And by an Act of King *James* II. [a] it is appointed again, That no Freeholder who held of the King under the Sum of *L.* 20, that is, Lands which were of that Extent, be conſtrained to come to Parliament or General Council, unleſs he was a Baron, or was ſpecially ſummoned by the King's Commandment, either by an Officer, or by a Writ.

[a] Parl. 14. cap. 75. anno 1457.

During this Period, it appears from the Rolls of Parliament, that the Sovereign created Lords of Parliament, not by Patent, as afterwards, nor by Writ, but by Cincture, and Proclamation made by Heraulds, who, in Contradiſtinction to the Barons, who even then had a Seat in Parliament, were called Lords of Parliament; and ſo it continued till the Reign of King *James* IV. that by a Statute [b] it is ordained, That from that Time no Baron, Freeholder nor Vaſſal, if he ſend his Procurator, was to be compelled to come perſonally to Parliament, under the Extent that now is, of 100 Merks; but all above that Extent were to come to Parliament, under the Penalty appointed by Law.

[b] Parl. 6. cap. 78.

From the Year 1457 to the Year when that Statute was made, 1503, the Sovereign is in the ſame Manner creating Lords of Parliament, while the Barons by Tenure, above the Extent of 100 Merks, were bound to give Preſence in Parliament: and ſo it continued downward till the Year 1587,

in the Reign of *James* VI. of *Scotland*, that by another Statute [a], the Act of Parliament *James* I. above recited, is ratified and approved, and ordained to be put in Execution, and the Method of Election is set down, and all Freeholders of the King, under the Degree of Prelates and Lords of Parliament, were to be present at the chooſing of Commiſſioners for the Shires; whereby the Barons by Tenure, were intirely turned out from ſitting in Parliament, otherwiſe than by Repreſentation, and the Lords of Parliament, whereof the Lord *Lovat*'s Predeceſſor was one, continued to ſit in Parliament without Election.

[a] Parl. 12. cap. 113.

This being the true State of that Order of the Peerage, which alone came to be called Lords Barons, it ſeems manifeſt, *firſt*, That they were not Lords Barons by Tenure, becauſe they were created by Cincture and Proclamation, and at length by Patent, from the Reign of *James* I. down to this laſt Period, in the Reign of King *James* VI. while the Barons by Tenure were intitled to ſit among them without Election; but by the foreſaid Statute 1587, were turned out of Parliament, and ordained to elect, with the other Freeholders, Commiſſioners to repreſent them in Parliament, when the ſaid Barons, created after the Act of King *James* I. wherein they are called *Banrents*, and *Lords of Parliament*, as the learned *Selden* [b] obſerves from our own Lawyer *Skene* [c], retained their Dignity and Seat in Parliament. *Secondly*, There was this Difference, that the Deſcent of Baronies by Tenure, was limited by Charters, to ſuch Heirs as therein were ſubſtituted; whereas the Dignity of Lord of Parliament ſtood limited by no Writ, neither any Thing that was ſaid by the Sovereign, or in his Name, at the Time of the Belting or Cincture; for that any Charter, at the Time of ſuch Creation, was preſented in Parliament, is ſupported, neither by Hiſtory nor Record; and at this laſt Period alone, became effectual, in a great Meaſure,

[b] Selden, titles of Honour, Part. cap. 7. § 2.

[c] Skene de verb. ſignif. verbo *Banrent*.

ſure, the Scheme intended by King *James* I. who firſt diſtinguiſhed between Lords of Parliament, and the Barons who had Juriſdiction, and a Seat in Parliament; but were at laſt plainly declared to be of the Rank of Commoners, and had no Share in the Legiſlature but by Repreſentation.

Upon this Point, the Procurators for Mr *Mackenzie* ſeemed to inſinuate, That, prior to the Reign of K. *James* I. there were Lords Barons; but this was ſupported by no Argument or Authority of any Force; for, in theſe Days, *Laird* is now only a Corruption of what was then *Lord:* And however the more powerful Barons might command to themſelves greater Reſpect, yet, as to Seat or Dignity in Parliament, by what is above mentioned, it appears, that all the Barons were upon a Level. And ſo far the Law of *Scotland* agreed with the Feudal Law; wherein *Marchia*, *Ducatus*, *&* *Comitatus*, are mentioned among the greater Dignities, and ſeem to ſtand oppoſite to the *Capitanei vel Valvaſſores*, which are ſaid to be either *Majores* or *Minores*; as is evident from the Books of the Feus [a]. And, in the ſame Manner, there were Earldoms in *Scotland*, known as a Dignity, but nothing under it; all the others being indeed *inter Proceres & Magnates Regni;* whereof ſome were *Majores*, others *Minores*, as the *Valvaſſores*; but not as Dignitaries, their Rights being territorial; but having no Cincture or Belting from the Sovereign, the Fountain of Honour and Dignities, until the Period mentioned in the Reign of *James* I.

[a] Conſuet. feud. lib. 1. tit. 14.

So much having been ſaid concerning the Nature of this Dignity, it is next to be conſidered, by what Law a Succeſſion is to be governed, where the Author of the Right of Inheritance has not, either by Word or Writing, declared his Pleaſure: For it is admitted, notwithſtanding what is after to be obſerved, that Dignities, and particularly this of

Lord

Lord Baron of Parliament, might have been made deſcendible to Heirs whatſoever, either by expreſs Grant, or by conſuetudinary Law, expreſs and poſitive. But the Doubt that remains is, where the Preſumption muſt lie of the Will of the Granter, and whether, in this particular Caſe, there is any conſuetudinary Law from which it can receive a Deciſion.

On this Subject it was urged againſt *Simon* Lord *Lovat*, "That, in the Opinion of Lawyers, *Heirs* were underſtood "to be *Heirs whatſoever*, and to comprehend Females, when "nearer in Degree than Males: And conſequently, when a "Right is deſcendible, and no Heirs are mentioned, or Limi-"tation appears, the Law of *Scotland* ought to preſume, that "the Deſcent was to the *Heirs general*: That, from the Books "of the *Majeſty*, it was manifeſt the Succeſſion of Females "took place upon Failure of Males in the ſame or a nearer "Degree, and that the Feudal Law could not be the Rule; "at leaſt, if any feudal Rule took place, it behoved to be the "conſuetudinary Feudal Law of *Scotland*, which ſtood in fa-"vour of the female Succeſſion."

In anſwer to this, it is neceſſary to obſerve, that, according to the Opinion of our very learned Lawyer Sir *Thomas Craig* [a], the proper Law of *Scotland* was thought to be contained within a very narrow Compaſs, namely, our Acts of Parliament; and therefore he ſets down Rules by which Judges are to govern themſelves in the Deciſion of Controverſies. And the firſt is, To have Recourſe to the Acts of Parliament, which are the proper Law of *Scotland*; and if they are ſilent, then, according to the ſecond Rule, Recourſe muſt be had to a continued Series of Deciſions, and conſtant Conſuetude. And the third Rule is, To go to the Source for determining *novos Caſus*; and among the ſeveral Fountains of our Law, namely, the Feudal, Canon, and

[a] Lib. 1. dieg. § 8. p. 30. in folio.

and *Roman* Laws, he ſays, *præferendum jus feudale.* And further goes on, in thoſe remarkable Words, *Imo ſi exacte rem omnem æſtimare velimus, hoc jus proprium hujus regni dici poteſt (ſi latius juris proprii nomen extendamus) cum, ex ejus ſcaturigine et fontibus, omne jus quo hodie utimur in foro, omniſque uſus et praxis defluxerit:* And from theſe Premiſſes infers, *Si quid dubii oriatur, origines ſemper repetendæ ſunt, ut inde quod æquum eſt dignoſcatur.* Therefore, according to the Opinion of that Lawyer, the main Spring and Source of our Law, is the Feudal Law; and conſequently, when any doubtful Caſe ariſes, the Rules there laid down, are the Standard and Meaſure by which the Doubt is to be determined.

This Opinion he repeats in ſeveral other Places of his Book; and in many Inſtances demonſtrates the uſefulneſs of his Rule. Neither is any of our Lawyers, who wrote ſince that Time, of a contrary Opinion.

Having ſo far ſaid in general, concerning the Rules of determining this Matter, it is plain, we have no Act of Parliament from which any direct Light can be had in this Point. And as for Deciſions, no Courſe of them can indeed be pretended on either Side; though it ſhall be ſhown, that ſuch of the Deciſions of the ſupreme Court, where the Matter has, with greateſt Accuracy, been inquired into, the Opinion of the Judges is for the ſaid *Simon* Lord *Lovat.* And as to the Opinion of our Lawyers of greateſt Learning and Reputation, they ſeem to think, that the ancient Cuſtom of *Scotland* did by *Heirs,* without the Addition of the Word *whatſoever,* preſume, ſuch Inveſtiture did import a Deſcent of the Eſtate in favour of *Heirs-male.*

The learned Lawyer *Craig* [a], after laying down the Rules of the Feudal Law, ſays, That Women did not ſucceed in Feus

[a] Lib. 2. dieg. 14.

by the Feudal Law, as they were prohibited to have any Office, or civil Function, by the *Roman* Law [a], and ſets down the Exceptions, namely, unleſs the Inveſtiture, or Grant of the Feu, does, in expreſs Words, provide, That Females, as well as Males, or that *Heirs whatſoever* ſhall ſucceed; and even in that Caſe, ſo long as there is any male Deſcendent of a Woman ſucceeding, Females are excluded; and where Daughters did at laſt ſucceed, the Right of Primogeniture was early introduced, that Feus might not be divided; and then goes on to admit, that, by the modern Cuſtoms of *Scotland*, *Heirs*, without the Addition of *whatſoever*, comprehend Females as well as Males; and at laſt puts the Queſtion, How this Diſagreement ſhould happen between our Cuſtoms and thoſe of the Feudal Law? and anſwers at Length, That this ariſes alone from the frequent Addition of the Word *whatſoever*, which therefore, when omitted, came to be underſtood. But then he maintains, that originally in our Law, as well as in the Feudal Law, before it was ſo common to have Inveſtitures in favour of Women, there was no place for their Succeſſion; and in all Events, only upon the Failure of all the male Deſcendents, even in *feudo fæmineo*, though, in our preſent Cuſtom, it has received a Limitation.

Neither ſhould this appear ſtrange to any who conſiders the Law of *Scotland*, becauſe at this Day, as that Author obſerves, Males in the ſame Degree exclude the Females; and it is extremely probable, that the Alterations which now appear in our Law, from the Feudal Law, crept in with a ſlow Motion. Women were allowed to ſucceed in the Beginning; but then under the Regulations of the Feudal Cuſtoms, upon Failure of all the male Deſcendents of the

[a] Fœminæ ab omnibus officiis civilibus vel publicis remotæ ſunt, et ideo nec judices eſſe poſſunt, nec magiſtratum poſtulare, nec gerere, nec pro alio intervenire, nec procuratores exiſtere, l. 2. ff. de reg. juris.

[b] Eadem dieg. p. 237. Quod ſi quando fœminæ, ex tenore inveſtituræ, ad ſucceſſionem admittantur, id tantum ſub ea conditione fit, ſi deſunt maſculi in eodem gradu; maſculi enim, ſive unus ſive plures ſunt, ejuſdem gradus, fœminas excludunt, etiamſi feudi tenor ita concipiatur, ut titio et ejus heredibus maſculis et fœminis concedatur; nam ne hoc quidem caſu fœminæ ſuccedunt, quamdiu maſculus ſupereſt qui poteſt ſuccedere.

the Perſon who received the Inveſtiture, and that becauſe Feus were commonly ſo given. Afterwards, as Feus became frequent, *heredibus quibuſcunque*, Inveſtitures came to be underſtood (to ſpeak in the prevailing Dialect) with a Leaning to Females. But there it ſtopt, and ſtands at this Day. Men, in the ſame Degree, exclude them from the Succeſſion in a Feu.

This Matter is at length reaſoned, and diſtinctly ſet down, by our very learned Lawyer my Lord *Stair* [a], who explains the feudal Rules in the ſame Manner as *Craig*, and obſerves, that Women and their Iſſue were utterly excluded; that none ſucceeded, but ſuch Males as were Iſſue of the firſt Vaſſal; but that, by the Courſe of Time, Fees declined from the Nature of ancient Fees, and the Inveſtiture was the Rule. And ſo if the Fee is granted to Heirs whatſoever, then not only doth the Iſſue of the firſt Vaſſal, but all other lawful Heirs, whether male or female, ſucceed: And then adds (which is to be remarked in this Caſe particularly), *And now Fees being ordinarily acquired by Sale, Excambion, or the like onerous Titles*; Feuda ad inſtar patrimoniorum ſunt redacta; *Heirs whatſoever are commonly expreſſed*; *and if they were not, they would be underſtood*; *for that which is ordinary is preſumed.* So that, according to his Lordſhip's Opinion, where Feus were not ſaleable, acquired by Excambion, or like onerous Titles, and before it became common and ordinary to take them to Heirs whatſoever, the Cuſtoms of *Scotland* were the ſame with the feudal Rules. And where theſe Circumſtances introducing the Alteration did not occur, there is not a Colour for pleading, that the Rules of Succeſſion in the feudal Law are not the ſame, or near the ſame, with thoſe in the Law of *Scotland*; or that, in doubtful Caſes, Recourſe is not to be had to them.

[a] Lib. 3. tit. 4. § 20. & 21.

The Lawyers mentioned, do fully ſet down what theſe feudal

feudal Rules in Succeſſion were, with regard to Land-rights, namely, That it was againſt the Nature and Conſuetude of Feus, that Women ſhould ſucceed [a]; and againſt the Laws of the Feus [b]: And that, even in feminine Fees, Women, without ſpecial Paction, only ſucceed after all the male Deſcendents failed [c].

It is likewiſe plain, from the Definition of a Feu [d], and the Laws, that Feus were not alienable [e]. And indeed a *feudum paternum*, not even by the Conſent of the Superior, without the Concurrence of all the Agnats that could ſucceed; and that, in the tranſverſe line, there was no Succeſſion, but among the Deſcendents of the firſt Perſon who received the Inveſtiture; becauſe the Succeſſion was not in the *Right* of the Perſon who received the Feu, but *vi pacti*, in the *place* of the Perſon who received the *beneficium*; and on that Account, the Succeſſors were not liable for the Debts of the Predeceſſors [f]. And, in the *laſt* place, It is known by all who caſt their Eye upon the Feudal Law, that Feus were more ancient than Charters; and that the Method of acquiring them, was by Inveſtiture, in preſence of the *pares curiæ*, without any Neceſſity of the *breve teſtatum*, which was only a Proof of the Inveſtiture in Writing, and not eſſential to it [g].

Theſe being the Rules of the Feudal Law, let it be conſidered, that the honorary Title of Lord of Parliament, under the Dignity of Earls, was a Feu; for which Service in Parliament, Fidelity and Homage, was to be paid. And then let its other Circumſtances be compared with the feudal Rules, and it muſt to Demonſtration appear, in every Particular, to have been governed by them from the Beginning.

As, in ancient Feus, what conferred the Right was Inveſtiture, and not any Grant in Writing; ſo, till of late, when Patents

[a] Feudorum lib. 2. tit. 2. Quid ſit inveſt. § ult.

[b] Tit. 1. De his qui feudare poſſ. § Hoc autem, lib. 1. tit. 6. Epiſcop. vel Abbat. § Quin. etiam aud. tit. 8. De ſucceſſ. feud. & § ult. & multis aliis.

[c] Cap. unic. De feud. fœmin. & tit. 104. Caſus in quibus fœminæ in feud. ſucced.

[d] Tit. 23. Quibus cauſis feud. amit. in fine.

[e] Tit. De alienatione feudi.

[f] Tit. 45. An Agnat. vel fil. poſſ. ret. feud. repub. hæred. lib. 2. feud.

[g] Lib. 1. feud. tit. 2. § 1. & tit. 4. & lib. 2. tit. 2. in medio princip.

Patents were deviſed, there cannot be produced in *Scotland* a Grant of the Dignity of Lord Baron, to any of the Noble Families who have poſſeſſed that Order of Dignity, from the Reign of King *James* I. until the Reign of King *James* VI. And it would be a ſtrange Fatality, if by Grants they held their Titles; all of the numerous Grants ſhould have been ſo clean ſwept of, that neither on Record, nor in the Hands of private Perſons, any Veſtige of them is now to be ſeen. Therefore, the Inveſtiture in Parliament, in Preſence of their Peers, which remains upon Record, was the only Title by which they held their Dignity, agreeably to the old feudal Rules.

2*do*, Feus were not alienable, nor *in commercio*, without the Conſent of the Superior; ſo neither can it be alledged, that this, or any other of our Dignities, were patrimonial and alienable Subjects of Sale, that could be appriſed or adjudged, or any other Way transferred from the Grantees, otherwiſe than by Reſignation in the Hands of the Sovereign.

3*tio*, By the old feudal Rules, *Beneficia* went to no Collaterals, but ſuch as were the Deſcendents of the Perſon firſt inveſted, without the Force of a ſpecial Paction in the original Grant: And it cannot be denied, that this has likewiſe obtained in all our Dignities, and particularly in this of the Lord Baron.

4*to*, As, in the Feudal Law, the ſucceeding Vaſſal did not, by entering upon the Feu, and holding it, become Heir to his Predeceſſor, and ſubject to pay his Debts; ſo neither does any Peer, by accepting of the Peerage, thereby become liable to pay his Predeceſſors Debts.

When, in the Matter of Dignities, this Harmony of our Cuſtom with the Feudal Law is manifeſt, and after what is ſaid from the Opinion of *Craig*, concerning the Authority

of the Feudal Law in *Scotland*, when a Dignity is conferred, and the Sovereign who confers it, appears to have ſaid nothing in relation to the Heirs that ſhall ſucceed, how is it poſſible to doubt, but that the Succeſſion, underſtood, but not expreſſed, is to be determined by the Nature of the Feu conferred, and the feudal Rules, by which, in other Particulars, it is apparently regulated?

The Caſe is ſtronger than if Heirs had been expreſſed; becauſe there the Cuſtom of adding *whatſoever*, might be argued to affect that Expreſſion, with the Preſumption, that *what is ordinary is underſtood*, if, in the Time of King *James* I. ſuch Clauſes had been uſual, as it is believed it was not: But where no Heirs are expreſſed, and when it is conſtrued to be deſcendible only from the Analogy of the Feudal Law, there is no Room left for applying this Preſumption. And King James I. upon whoſe Will the Deſcent depended, when he conferred the Dignity by Inveſtiture only, cannot be ſuppoſed to have had any other Rule in his Eye.

It is a Circumſtance here not immaterial to obſerve, that the Grant of the Earldom of *Strathern* by *Robert* II. to *David* his Son, is ſtill extant, and in the Records; and it is limited to him *& heredibus*. He died, leaving one Daughter, who was married to *Patrick Graham*; and of this Marriage *Malice Graham* was Iſſue, who, in the Right of his Mother, was in Poſſeſſion of that Earldom. Upon the Return of King *James* I. to *Scotland*, he reſumed the Earldom, as *Buchanan* repreſents it [a], becauſe the Grant had that Condition, *Ut deficiente ſtirpe maſcula, ad Regem rediret, feudumque eſſet maſculinum, ut interpretes juris nunc loquuntur.* Whereby it is plain, that he proceeded upon the Suppoſition, that, agreeable to the feudal Rules, *heredes*, without the Word *quicunque*, did not comprehend Females: And that Sovereign being the firſt who conferred the Dignity of Lord Baron,

[a] Lib. 10. p. 193. edit. Ruddim charter in the Rolls of King David II. Carta 101.

Baron, the Opinion of Lawyers in his Time, muſt ſurely have a great Deal of Weight, to preſume in favour of the male Succeſſion, where a Dignity was granted deſcendible, without any ſpecial mention of Heirs.

It is true, that the Relations of *Malice Graham* reſented this Matter to the Height of great Barbarity upon that brave Prince; and, conſiſtent with the Principles now laid down, it was a Stretch, there being no male Deſcendents of the firſt Grantee; and according to the Rules of the Law of *Scotland*, there might have been Place for the female Succeſſion, as is hereafter to be obſerved; yet, nevertheleſs, it is an undeniable Argument, that, in thoſe Days, *Heirs*, without the Word *whatſoever*, did not prefer Females, while there were Males claiming, who were deſcended of the Perſon in whoſe favours the Feu was originally granted.

To explain this a little further; even in the higher Dignities, it is manifeſt, from a Condeſcendence given in by *Simon* Lord *Lovat*, that, in the Succeſſion of ancient Earldoms, the Males deſcended of the firſt Dignitary did ſucceed, to the Excluſion of the Females; therefore, if what was ordinary is preſumed, then an Earl created by Belting or Cincture only, would have been ſucceeded by his Heirs-male, to the Excluſion of Heirs-female; and, nevertheleſs, if the Heirs-male ſhould happen to extinguiſh, the Heir-female might and did ſucceed, according to the Cuſtom of *Scotland*, as appears from the Succeſſion in the Earldom of *MAR*, and the Earldom of *Carrick*, and others, that might be inſtanced; but no one Example can be brought, even in theſe higher Dignities, where-ever the male and female Succeſſion competed, and the Heirs-general were preferred.

To ſupport this Opinion, concerning the Succeſſion of Females, only upon Failure of Males, it may be obſerved, that in

in the Laws concerning the Succeſſion of the Kingdom by *Kenneth* III. mention is only made of the Preference of a *Nepos* or Grandchild by a Son, to a *Nepos* or Grandchild by a Daughter, and no Oppoſition ſtated between a Female and a Male; which ſeems ſtrongly to inſinuate, that even the Males *in feudo fœmineo* were preferable to Females in the ſame Degree. And as *Robert* the *Bruce* his own Claim was founded upon that Rule in the Feudal Law; ſo, when he ſucceeded to the Crown, and had only a Daughter, he conferred the Earldom of *Carrick*, which deſcended to him by his Mother, upon his Brother *Edward*, and his Heirs-male; as indeed, by Act of Parliament, held after the Battle of *Bannockburn*, he made him Heir of the Crown, failing Heirs-male of his own Body.

Though, in the Feudal-law, Females did not ſucceed but by Paction; yet ſuch Pactions became frequent and ordinary, inſomuch, that what was uſual, was preſumed; and therefore, in Courſe of Time, Females were allowed to ſucceed in Dignities, upon Failure of Males, without any particular Covenant for that Purpoſe; and the rather, that the Succeſſion *in infinitum*, to all the Deſcendents of a Perſon receiving a Feu, had more Place in Dignities than in ſimple Feus, according to the Opinion of all the Feudal Writers[a]; though, on the other Hand, Dignities, which were originally Juriſdictions, not only in the Feudal Law, but likewiſe in the *Roman* Law, were always deemed a more improper Subject to deſcend to Females, than Fees without Juriſdiction: And as to them, by the Conſtitution of *Frederick Barbaroſſa*[b], the Right of Primogeniture, then not received into the Feudal Law, did obtain; which ſhows, that there is, and always was, a great Difference between the Succeſſion of Dignities, and that of Land-eſtates; and, at the ſame time, takes off an Exception that was offered, why the Feudal Law could not regulate the Succeſſion of Dignities;

[a] Vid. *Jul. Clar.* de feud. queſt. 79. *Baldus* poſt eum afflict. & cæteri in cap. 1. de feud. March.

[b] Feud. lib. 2. tit. 55. § 1. Præterea Ducatus Marchia, Comitatus, de cætero non dividatur, ita ut omnes qui partem feudi habent, jam diviſi vel dividendi, *&c.*

Dignities; becauſe, according to the Rules of it, though Females were excluded, yet there was no Right of Primogeniture; which, from the Obſervation above made, does not hold with regard to Dignities.

From the Condeſcendence of Inſtances in the higher Dignities, hereby referred to, it is apparent, that the general Rule ſeems to have been, That the Heir-male was preferable to the Heir-female; and, at the ſame time, it is not denied, that Females might, and did ſucceed, even in theſe higher Dignities. It is an Argument in common Reaſon, which ſupports the Diſtinction above ſet down, eſpecially when, in the particular Inſtances where Females have ſucceeded, it cannot, from any Record or Hiſtory, be vouched, that there was one Heir-male exiſting, deſcended of the Perſon who was in the Right of that Dignity; eſpecially when 'tis conſidered, that, in the Titles of the Feus, it was by Paction alone that Women ſucceeded; and, in Conſequence of ſuch Paction, they never were again admitted to the Succeſſion, but, upon the Failure of the male Deſcendents, which, in earlier Times, ſeems to have been received, as underſtood in the ſame Manner as our Lawyers ſay: In the later Period of our Law, *Heredes*, which, in the Feudal Conſtruction, ſignified only *Males*, was at Length brought to comprehend even Females. But, as the Alteration happened by Degrees, and there is ſeldom wide Steps and Bounces in the Law, without a Statute; ſo to argue from the laſt Period to the firſt, is ſurely not fair Reaſoning.

Neither, without this Diſtinction, is it poſſible to reconcile the Deciſion in Parliament, in favours of the Family of *MAR*, with the Deciſion of the Lords of Seſſion, in the Competition between the Families of *Crawford* and *Sutherland*, of which laſt there was an Heir-male, but he did not claim the Honours; for, in that caſe,

[a] January 23. 24. 25. 1706. which is obſerved by *Forbes* [a], the Lords found, "That the "Deſcent of the Dignity, by Propinquity of Blood, from "*William* Earl of *Sutherland*, who married King *David*'s Si- "ſter, to Earl *John*, who ſucceeded 1512, ſufficiently inſtruct- "ed; but that the Dignity was not conveyed from him, with "the Eſtate, to his Siſter *Eliſabeth*, who was Heir general." Which is a Judgment in Point, ſupporting the Argument pled for *Simon* Lord *Lovat*, that Dignities do not deſcend by the ſame Rules as patrimonial Eſtates; although the Arguments urged at the Pleading, from the Books of the Majeſty, and the common Rules of Succeſſion in *Scotland*, were, with all the Advantage they were capable of, repreſented in the Papers then laid before the Lords.

Another Argument that ſeems to favour the Diſtinction above laid down, is, That immediately upon the Lord *ERSKINE*, his having his Right to the Earldom of *MAR* declared, whereby it was found to be *feudum fœmineum*, his Eſtate was limited to the Heirs-male: Which ſhows what the Opinion of the Nation was, at that Time, concerning the Succeſſion of thoſe Dignities; ſince it is not to be preſumed, that the Eſtate would have been ſent in one Channel, and the Title in another, when the Family had, for ſeveral Reigns, with Warmth, inſiſted upon their Right to the Earldom, and at laſt prevailed by the Juſtice of the Parliament.

As *Simon* Lord *Lovat*, his Claim, is ſtrongly founded upon the Feudal Law, and the Obſervations aforeſaid; ſo is he in a particular Manner ſtrengthened by the Succeſſion in all the Families who were created Lords Barons ſince the Reign of King *James* I. downwards: For Proof, he appeals to the particular Condeſcendence on this Subject, given in by him; from which it is moſt manifeſt, that where the Heirs-female married into powerful Families, able to aſſert their own juſt Right, nevertheleſs the Dignity of Lord Baron was always taken up by the

the Heirs-male, and their Right acknowledged by King and Parliament; which ſurely muſt be an Argument of the greateſt Weight: For though the Matter was never drawn into Debate, or litigated before a Court of Juſtice, becauſe moſt probably this Matter was ſo clearly underſtood, that no Claim could, with any Countenance, be ſet up; yet ſtill the general Acquieſcence muſt explain a dubious Matter: And from that alone does cuſtomary Law ariſe; for a Deciſion is rather declaratory of Cuſtom, than an Introduction of it, otherwiſe Judges would have the Power of Legiſlature. But that, in the Senſe of Law, is always taken to be Cuſtom and Uſage, when, in Fact, as often as Caſes occur, the Parties concerned are governed by a received Opinion, in their Judgment Law; and this Acquieſcence is a tacit Conſent of King, Parliament, and People, and ſo it becomes Part of the Conſtitution, which all are bound to give Obedience to; and thus we find it in the Laws of the Twelve Tables [a] commanded, That every Perſon ſhould give Obedience to Cuſtom.

[a] Lib. 12. tab. ritus familiæ, patriæque ſervant.

It was therefore in vain urged, That the Precedents, which were ſo clear of the Side of the ſaid *Simon* Lord *Lovat*, could have no Influence in determining this Queſtion, where no Heirs were ſpecially mentioned, when the Dignity was conferred: Seeing thereby it is plain the Sovereign acquieſcing, declares what was not ſaid in conferring the Dignity, and the whole Nation tacitly conſenting, made the Cuſtom a Rule, not to be reverſed, but by Act of Parliament.

Some few Inſtances were offered on the other Side; but were either late, and by ſpecial Patent, or ſo dark and uncertain, that they could not be founded on with any Colour; and therefore, in order to take off the Force of the many clear Inſtances for the male Succeſſion, Recourſe was had to this Plea, "That Inſtances were of no Moment;" and next,

"That

" That the Dignity was, in Effect, territorial; and the Crown " having, in ſome of thoſe Caſes, granted the *Dominia*, upon " Reſignation, to Heirs-male, the Dignity was thereby turned " out of its proper Channel."

But this Subterfuge cannot ſerve the Purpoſe; becauſe it is not pretended the Dignity was reſigned: And, by what has already been ſaid, it ſeems to be a Matter beyond Doubt, that the Dignity of Lord Baron was not territorial; for if it was, then it was alienable, it could have been carried off by legal Diligence, and paſſed to ſingular Succeſſors; which is utterly repugnant to the Opinion of Lawyers, to the Rules of our Law, and the conſtant received Cuſtom, admitting of no Exception. Neither did the learned Lawyers, who urged this Argument, pretend to give any one Inſtance to ſupport it, but in the Caſe where Heirs-male excluded the Females; which, in this Controverſy, is no more than *begging the Queſtion*.

On the other hand, Inſtances can be given, where *Dominia* have been conveyed, and poſſeſſed by Gentlemen, who never pretended to the Rank of Lords of Parliament; and of Lords of Parliament, who never had their Eſtates erected under the Denomination of *Dominia*, and who retained their Titles after the *Dominium* or *Baronia*, from which they were denominated, was ſold and diſpoſed of, and remained no longer Part of their Property. The territorial Barons, who might have continued to ſit in Parliament down to the Year 1587, were at that Time obliged, with the other Commoners, to join in electing Commiſſioners for the Shires: So that there does not appear ſo much as a Shadow of Argument, that the Limitation of the Eſtate, where the Dignity was not reſigned, was a Breach upon the Succeſſion of the Dignity."

It ſeems proper here likewiſe to obſerve, that the Practice of the Crown, when Patents were introduced, in limiting generally the Succeſſion to Heirs-male, has Force with it, even to explain the prior Cuſtom: for ſince it is undeniably ſo, after the Crown ſeemed more diſpoſed to enlarge the Peerage, it is to be preſumed *retro* to have been the Maxim likewiſe in former Reigns. And this Fact, that Patents were generally limited to Heirs-male, is likewiſe proved by a particular Condeſcendence, and is in ſome Meaſure confirmed by what is ſaid by Sir *James Stewart* [a], in his Anſwers to *Dirleton*'s Doubts and Queſtions in Law, that a Patent of Honour is ordinarily granted to a Perſon and his Heirs-male: Where, at the ſame time he obſerves, that it was thought of old, that Titles of Honour ſhould not be reſigned *in favorem*, but at beſt *ſimpliciter*; which is an Authority, and ſtrong Conſideration againſt the territorial Scheme urged on the other Side of this Argument.

[a] Verbo, *Patents of Honour*.

But then, if it ſhall for once be ſuppoſed, that the limiting by Charter the *Dominium* to Heirs-male, does at the ſame time limit and ſettle the Deſcent of the Honours, the Argument in this particular Caſe is entirely for the ſaid *Simon* Lord *Lovat*: For it is already obſerved, that by Charter in the Year 1539, the Lordſhip or Barony of *Lovat* is limited to Heirs-male; which failing, to Heirs whatſoever: Therefore, upon that Principle, the Title of Honour was undoubtedly by the Sovereign ſettled in the ſame Channel; and ſince that Period no Reſignation of the Honours, or even of the *Dominium*, by any of the Lords of *Lovat*, is pretended to have been made, whereby that Deſcent could be cut off; the Titles to the Eſtate in the ſaid *Hugh Mackenzie*, Eſq; depending entirely upon an Incumbrance by an Appriſing. It is a needleſs Diſtinction the Defender made betwixt *Dominium* and *Baronia*, That the firſt carried the Dignity, but not the laſt: But the Truth is, none of them carried it; for ſeveral Gentlemen who never

were, or are Peers at this Day, have their Lands erected *in dominium*, ſuch as *Swinton*, *Luſs*, and many others. *Dominium* and *Baronia* are reciprocal Terms.

It was farther obſerved for *Simon* Lord *Lovat*, as an Evidence how his Anceſtors underſtood that Dignity to be deſcendible, That, in a Charter, the Lands of *Inverallachy* are given off to a Son of a ſecond Marriage, and his Iſſue-male; which failing, to return to the Heirs-male of the Granter, *Dominis de Lovat exiſtentibus*.

It was anſwered for Mr *Mackenzie*, That this ſeemed to import, that there might be Heirs-male of that Family who would not be Lords *Lovat*. But this indeed yields a ſtrong Argument for the male Succeſſion, becauſe it demonſtrates the Heirs-male were to be Lords of *Lovat*; though, at the ſame time, as the Family is extremely ancient, and had Deſcendents before their being created Lords Barons, who could not ſucceed to the Dignity, the Eſtate was intended to ſtand limited only to ſuch Heirs-male as were deſcended of the firſt Lord Baron; and ſo could ſucceed to the Dignity.

" The Procurators for Mr *Mackenzie* did except againſt ha-
" ving this Matter judged by the Feudal Rules, becauſe we had
" Dignities before we received the Feudal Law amongſt us;
" that the Feudal Law was conſuetudinary and local, different
" in the ſeveral Countries where it took place; therefore no
" Feudal Rule, foreign to, and not acknowledged by the Cu-
" ſtom of *Scotland*, could afford any ſolid Argument; and ta-
" king the Matter in that View, it is ſaid, that, in the moſt an-
" cient Books of our Law, the *Leges Malcolumbi*, *& Regiam*
" *Majeſtatem*, we have it, that *Malcolm Mackenneth* diſtributed
" the Lands in *Scotland* among his Subjects; and in the Book
" of the *Majeſty*, and in theſe Laws, that *Wards* were due for
" Females; and that indeed they ſucceeded in Feus."

And

And further, "That it was a Diſtinction entirely imaginary, "that Land-rights were governed by one Rule, and Dignities "by another; more eſpecially ſeeing, in our neighbouring Na- "tions, it would appear from Hiſtories, and other Accounts "we have of them, that Dignities did deſcend to Females as "well as Males."

Anſwered, That if we can give Credit to our Hiſtorians, *Kenneth*, before *Malcolm*, had given off a great many Lands; and our learned Countryman *Craig* has advanced many Arguments to ſupport his Opinion, that theſe Books are not of real Antiquity. But, to let that paſs, as it was not diſputed in the Courſe of the Debate, but that Females might and did ſucceed, both according to the feudal Rules, and the ancient Conſuetude of *Scotland*, upon Failure of the male Deſcendents, the Arguments from them prove little. But then it ſeems moſt rational to believe, that a warlike People, not famous in ancient Times for Learning or Laws, had Cuſtoms borrowed from the Nations who were of the ſame Diſpoſition, before any of the written Laws, that now appear digeſted into a kind of Syſtem; and that ſuch would be agreeable to the Fountain from which our Law in the ancient Times undoubtedly flowed. And as, before *Malcolm Mackenneth*'s Time, there were Dignities in *Scotland*; ſo no Rules appear in this Syſtem concerning the Deſcent of Dignities. It is to be preſumed, that the more ancient Rules remained in Force; becauſe Dignities were not patrimonial, and *in commercio*, and ſubject to Alteration, from the Cauſe aſſigned by all our Lawyers for the Change that happened in the Succeſſion of Land-rights, namely, that they were alienable, and as much hereditary as Rights entirely allodial.

It was inſinuate in the Debate, "as if the Feudal Law had "never been received in *Scotland* till after the Conqueſt in "*England*; and therefore, as it muſt be ſuppoſed there were

"Laws

" Laws in *Scotland* prior to that Time, our feudal Cuſtoms " would no doubt be blended with the prior Laws; ſo from " thence muſt reſult feudal Cuſtoms entirely peculiar to us, " and different from thoſe compriſed in the Books of the " Feus." But here no Evidence was offered of this Propoſition: And *Craig* has declared directly againſt it; for he ſays [a], That in *Scotland* anciently we had no written Law; which induces him to believe, that the Feudal Law was received long before the Conqueſt; and obſerves, that there are ſeveral Statutes among thoſe of *Malcolm Mackenneth* prior to that Period, which ſhow that the Feudal Law was then received in *Scotland*; and adds, that there are many Reaſons which move him to believe the Feudal Law was ours before it was received in *England*; and particularly he ſays [b], that it is leſs mixed with peculiar Conſuetude in *Scotland*, than in their neighbouring Nation; and takes notice, that there are ſome Footſteps in the Conſtitution of King *Kenneth* II. who begun to reign in the 834, which confirm his Opinion; and uſes ſeveral other Arguments, not neceſſary to be inſerted here at Length: And a little further on, in the ſame *Diegeſis* [c], lays it down, That as to our ancient Law before that Conqueſt, Controverſies were determined by Jury; in which they followed the Order of the Feudal Law, according to the primitive Inſtitution of it: Wherefore it cannot at all appear ſurpriſing, if Dignities deſcendible only by Cuſtom, without the Words of an expreſs Grant, ſhould be regulated by the feudal Rules.

[a] Lib. 1. dieg. 8. in princip.

[b] Hoc enim certiſſimum eſt, nos purius hoc jus habere quam vicinos, ut in rivulis aquarum, qui, quo propiores ſunt fonti vel ſcaturigini, eo ſunt puriores.

[c] § 4. In quo ordinem juris feudalis, quo primi feudorum conſtitutores uſi ſunt, noſtri ſunt ſecuti.

It was an Argument of little Force that was urged, namely, " The pretended Abſurdity that one kind of Feu ſhould " be governed by Rules different from thoſe which were e- " ſtabliſhed in Feus of another kind." For that there are certain ſpecial Rules with regard to Dignities confeſſed and acknowledged, is a Matter undeniable; and, even in Land-rights, old and new Feus are deſcendible in different Chan-

nels,

nels, and allodial Rights in a third, different from both. And it is already obſerved from the Feudal Law, That the Right of Primogeniture obtained in Dignities, though not in other Feus; and even in the *Roman* Law [a], where all Rights were conſidered as allodial, and no bar was put to the Succeſſion of Women in other Rights, yet *in muneribus, honoribus, & immunitatibus*, there was no Succeſſion in the female Line: So that, even upon the Analogy of the *Roman* Law, as well as upon the Rules of the Feudal Law, the Claim of the Heirs-male ſeems to be founded.

[a] L. 1. § 2. ff. De jure immunitatis, l. 13. De muneribus & honoribus.

As to the Cuſtoms of other Nations, it does not appear ſo very material in this Queſtion, to enter into a particular Inquiry concerning them. As to ſome of the great Dignities in *France*, mentioned by the Opponents, and in other Countries, ſuch as the Dutchies of *Burgundy* and *Britaigne*, *Auſtria*, *Thouloufe*, and others, the Dignities were either territorial, which, it is believed, cannot with any Colour be pretended here, or found upon Trial to be ſettled upon Females, *proviſione hominis*; and the Controverſies concerning ſome of them were determined *rationibus ultimis Regum*; not by the Sword of the Law, but by the Law of the Sword, and terminated by Treaties, *aliquo dato & accepto*. And the great *French* Lawyer *Cujacius* [b], touching the Succeſſion of *Auſtria* and *Thouloufe*, ſeems rather to be of Opinion, that the Females ought not to have ſucceeded; and ſays, That the Feudal Rules took Place *in Francia Occidentali*.

[b] Comentar. in tit. 1. lib. 1. De feudis.

The Argument urged with the greateſt ſeeming Force was the Cuſtom of our neighbouring Nation, where it is ſaid, the Feudal Law was received, and by which ancient Baronies do at this Day deſcend to *Heirs whatſoever*.

But to this it was anſwered, There was great Reaſon to believe the Feudal Law took Place in *Scotland* before the Conqueſt; that by King *William* I. it was introduced into *England*, with the Cuſtoms of *Normandy*. And the learned *Selden* [a] obſerves, and inſtances in the Earldom of *Northumberland*, given by that King to *Coſſpatrick*, That Dignities were granted to female Deſcendents, according to the *Saxon* Law; and further mentions another Example in the Earldom of *Leiceſter*, from *Cambden*; he likewiſe diſtinguiſhes between Baronies and Barons by Tenure and Writ, and Barons by Writ only, after the Conqueſt [b], until the Middle of *Richard* II. when the Form of creating by Patents was introduced in *England*; as to which he ſays [c], That he had not ſeen a Creation of a Baron by Patent, to him and his Heirs generally, all of them being limited to Heirs-male. So that from this Period it is manifeſt, according to the Authority of that Author, which is great, the Dignity of Lord Baron did ordinarily deſcend to the Heirs-male. And he makes it an Æra from which the Maxim which begun to have Footing from the Reign of *Edward* II. ſeemed to be received into the Government, That Titles of Honour were to be limited, ſo as not to be deſcendible to the Heirs-female. Now, if one ſhall reflect, that *James* I. of *Scotland*, his Return from *England* was in the Year 1424, in the Reign of King *Henry* VI. where he had remained for eighteen Years; and ſuppoſing him, as indeed it ſeems to have been the Caſe, to have drunk in the Maxims of the *Engliſh* Government, and to have made that the Model of his own Adminiſtration, it will not at all appear ſtrange, that his Will was, that the Deſcent of Barons ſhould be to the Heirs-male, and not to the Heirs-female; King *Henries* IV. and V. having intervened between King *Richard* II. and King *Henry* VI. Nor is it poſſible, with any tolerable Juſtneſs of Reaſoning, to argue from the expreſſed

[a] Titles of Honour, part 2. chap. 5. § 3. vide Craig. lib. 1. dieg. 7. p. 30. folio.

[b] Eod. cap. § 22.

[c] Eod. cap. § 28.

preſſed or preſumed Deſcent of Titles of Honour, from the Conqueſt down to the Middle of King *Richard* II.'s Reign, to the Deſcent of Title of Baron in *Scotland*, which was clearly introduced in the Reign of King *Henry* VI. of *England*; for, when the Conſtitution appears not, the Argument goes from what is ordinary to what is to be preſumed; and therefore it is as juſt a Conſequence, that the Creation of a Baron, after the Middle of King *Richard* II.'s Time, being loſt, and not appearing, it deſcended to *Heirs-male*, becauſe he granted no Patents to *Heirs-general*; as, that a Barony, or Title of Baron, conferred or granted by Writ aad Tenure, or by Writ only, prior to that Time, muſt be preſumed to deſcend to the Heirs general; becauſe ſo they were generally granted: Wherefore, if the Cuſtom of *England* was to have Influence in this Caſe, that Period muſt certainly be picked out while King *James* I. was in Captivity there, returned and introduced that Order of Dignity; and then, according to the Teſtimony of *Selden*, Honours were generally conferred to Heirs-male, and not to Heirs-female.

But then it is to be conſidered, that if we can give Credit to the Authority of the great *Coke* [a] in *England*, as the Senators of *Rome* were elected *a cenſu* of their Revenues; ſo, in that Kingdom, in ancient Times, in conferring of Nobility, reſpect was had to their Revenues; and therefore a Knight was to have *L.* 20 land *per annum*, a Baron thirteen Knights Fees and a Quarter, an Earl twenty Knights Fees: And this he pretends to prove by the Statute of *Magna Charta*, *cap.* 2. which is extremely different from the Nature of the Baronies and Freeholds in *Scotland*, that never were bounded by Extent, until the Act of Parliament of King *James* II. when the Barons, by Tenure only, and Freeholders, though no Lords, had a Seat in Parliament. And if the Baronies of *England* were of that kind, or whether, according to the Opinion of *Selden* [b], they were

[a] Reports, part 7. Mich. 2. Jac. Navel's Caſe.

[b] Titles of Honour, Part 2. cap. 5. tit. 26.

were not limited to any Number of Knights Fees, yet ſince they were territorial, Barons by Tenure, and that thoſe Barons, in the Reign of King *John*, ſeem, by the Bulk, to have been acknowledged as Peers, by virtue of their ancient Baronies, which were patrimonial and hereditary, and carried the Dignity along with them, without Cincture or Inveſtiture; it was no great Wonder, if the honorary Barons, at that Time, by Writ only, were conſtrued to have the like kind of Deſcent with thoſe to whom they were joined, unleſs the contrary did appear.

But, in *Scotland*, it was otherwiſe: The *Barones majores*, and who ſat in Parliament by virtue of their Baronies, were not at once adopted into the Order of the Nobility; but, from the Reign of King *James* I. down to *James* VI. had a Seat in Parliament, and then were entirely ſeparated from the Lords of Parliament, and conſtrained to join in Elections for Repreſentatives of Counties; while, during this Period, the Crown, firſt by Inveſtiture, and afterwards by Patent, was adopting Lords Barons into that Order, in which not one ſingle Family had originally a Place by ancient Barony, but from the Inveſtiture granted by the Crown. Therefore, even ſuppoſe no Alteration had happened in the Reign of King *Richard* II. there was no Argument from the Manner of the Deſcent of the ancient Peerage in *England* to that of the Lord Baron in *Scotland*; the rather that the *Saxon* Rules ſeem to have mixed with the *Norman* Cuſtoms, which cannot be ſaid with regard to *Scotland*: But then, as prior to the modelling of that Part of the Nobility here, Peerage was generally conferred in *England* to the Heirs-male, the Analogy, or probable Argument from the Cuſtom of the neighbouring Nation, turns ſtrong of the Side of the Heir-male.

As for the Exception, that the ancient *Scots* Cuſtom might have had the ſame Effect upon the Feudal Law, as the Laws in *England*, prior to the Conqueſt, had upon the feudal Rights introduced by King *William* the Conqueror; it is already obſerved, that the feudal Rules were the firſt in this Kingdom. And if it ſhall be ſuppoſed, that afterwards there were Deviations from them, by the Tenor of Inveſtitures; yet when there was no written Inveſtiture, and the *recurſus ad jus commune ſemper ſit facilis*, the Conſtruction taken concerning the Deſcent of the Title of Lord Baron, put in oppoſition to the territorial Barons, cannot at all appear ſtrange or unnatural.

The Opponents, in this Caſe, ſeemed to rely chiefly for Support on the Deciſion, *Oliphant contra Oliphant* [a]; where the Lords found, That no Writ or Patent being extant, Uſe was enough to tranſmit ſuch Titles to the Heirs-female, where the laſt Defunct had no male Children, and nothing appeared to exclude the female. But as there is no Reaſoning ſet down on either Side, and as the Point really on which the Matter turned in the Event of the Deciſion, had nothing in common with the Opinion there delivered, concerning the female Succeſſion, this ſingle Inſtance can have little Force; for as *Durie* there obſerves, neither the male nor female Heir had Right to the Honours, becauſe the Lord *Oliphant*, the Lady's Father, had, by a Contract, renounced his Right to the ſame, in favour of another; which, though it did not eſtabliſh the Honours in the Perſon for whom he deſigned them, yet it denuded himſelf; and therefore the Title and Dignity became dormant, until the King ſhould declare his Pleaſure. This Deciſion was given in preſence of the King, and thereby, in Effect, the Deciſion was only put in his own Breaſt. That the Preſence of his Majeſty had any Influence, would be indecent even to inſinuate; nevertheleſs, that the diſponing away of a Title of Honour, ſhould diveſt the Diſponer, ſeems a little uncouth, when it was not re-

[a] Durie's Deciſions, July 11. 1633.

ſigned

ſigned in the Hands of the Sovereign; and yet there was no bringing the Matter about, but by finding the Diſpoſition had that Effect. But after all, when it was put into the King's Power, he conferred the Title and Dignity of Lord *Oliphant*, upon the Heirs-male. So this Deciſion, as it is ſingle, and indeed ſingular, taking it in all its Circumſtances, can be of very little Weight; and if it wounded the Succeſſion of the Heir-male, like *Achilles*'s Spear, it brought a Cure.

[a] March 22. 1633, obſerved by Durie.

Mention was likewiſe made of a Deciſion [a], the King's Majeſty againſt the Earl of *Strathern*, from which it was obſerved, "That in order to defeat the Right of the Earl of *Airth*, to "the Earldom of *Strathern*, it was neceſſary to reduce the Re-"tours and Services of the Earl of *Monteith* to *Eupham* Coun-"teſs of *Strathern*, and *Patrick Graham* her Spouſe, and to "*David* Earl of *Strathern*, Son to King *Robert* II. which would "have been unneceſſary, if the Service had not carried the "Eſtate and Dignity."

But to this it is anſwered, That the Earl of *Monteith* did not pretend to ſucceed to the Dignity of Earl of *Strathern*, by virtue of his Service, or Right of Blood; but had procured a Patent from his Majeſty of that Earldom and Dignity, upon the Suggeſtion, that he was really deſcended of *David* Earl of *Strathern*; and having fallen under the Diſpleaſure of the King, his Majeſty was determined to have the Patent reduced, as obtained by Obreption; and for that End, it was abſolutely neceſſary to reduce the Service. And therefore it is no great Matter in the preſent Argument, whether it is ſuppoſed the Reduction was right or wrong; for, in all Events, the Earl of *Monteith*'s Title was to depend upon the Patent, and not on the Service, though the laſt was uſed as a Motive to procure the firſt.

But then, if the Caſe muſt go by ſingle Deciſions, the laſt muſt ſurely be the more prevalent, abſtracting from all other Conſiderations;

Conſiderations; and that in the Diſpute between the Earls of *Crawford* and *Sutherland*, not many Years ago, is as clear in point for the Heir-male, as the other can poſſibly be for the Heir-female. Neither is it of any Force, that a reclaiming Petition was offered againſt that Interlocutor, which was not adviſed, becauſe the Earl of *Crawford*, who prevailed, was in the Poſſeſſion; and therefore, if the Earl of *Sutherland* did not inſiſt, in having his reclaiming Petition adviſed, it muſt have proceeded from that he had no Hopes of Succeſs. And *Simon* Lord *Lovat* is certainly, by the Caſe as it ſtands, in Poſſeſſion of the Opinion of the then Judges: And that Caſe was argued moſt ſtrenuouſly on either Side, and the Arguments are extant and appear; whereas in the other, we have no more to ſupport the Deciſion, but the Narrative, *That the Lords heard the Reaſons* hinc inde *at great Length*; which ſurely makes a very great Odds between the two Caſes.

In the Courſe of the Debate, mention was made of the ancient Deſcent of the Regal Dignity, as demonſtrating what the Rules were, by which Dignities in earlier Times were deſcendible. But here it was obſerved, that the Crown of *Scotland* was ever allodial; and that, at leaſt ſince the Days of King *Robert*, it has been ſettled by Acts of Parliament. But if it were proper *magna componere parvis*, it is believed there is an Argument from the Laws of *Kenneth*, to ſhow, that, in his Time, there was even a Reſemblance by him intended to the feudal Rules; for in them he ſtates no Oppoſition between a Male and a Female, but between a Male of the male Line, and a Male of the female Line in the ſame Degree; which imports, that, according to the then Cuſtom, the Males *in feudo fœmineo* could alone pretend to ſucceed, at leaſt while there were Males, as the Caſe ſtood in *feudo fœmineo* by the feudal Rules. And if it was not ſo, then the Claim of King *Robert* the *Bruce* had not a Colour; becauſe he admitted, that *John Baliol* was deſcended of the eldeſt Daughter;

Daughter; but contended, That he being the neareſt Male in Degree, was preferable. And in the Letter to the Pope, ſtill extant, ſigned by the Nobility and Clergy of *Scotland*, they declare they are willing even to make Oath, that he had the Right of his Side, according to the Law and Cuſtom of *Scotland*.

It ſeems unneceſſary to obſerve, that the Paſſage cited from my Lord *Stair*, in his Inſtitutions, wherein he ſays, *That a Dignity, as other indiviſible Rights, deſcends to the eldeſt Heirs-female;* in regard that learned Author mentions this as a Rule only, where the Right is ſo deſcendible, but does not at all enter into the Queſtion, whether Honours are to be preſumed, where no Patent appears, to deſcend to Males or Females; and therefore is no Authority in the Queſtion before the Lords.

Simon Lord *Lovat* is unwilling to trouble the Lords with ſeveral other Particulars that might be of Uſe in determining of this Queſtion; becauſe his Paper is already drawn out to too great a Length, and that he relies more upon the Arguments that will ariſe from their Lordſhips own great Learning and Judgment, in a Point that requires uncommon Knowledge, than on any thing he is able to ſuggeſt by the Aſſiſtance of his Lawyers. But he begs Leave only to ſay, that if he can rely on the Authority of thoſe who are moſt converſant in Matters of Antiquity, and Succeſſion of Families, and what can be learned from Records and Hiſtory, ſhould the Lords give the Deciſion againſt him, many obſcure Perſons, and now of the loweſt Rank, deſcended from Heirs-female, would be raiſed at once to the Dignity of Peers, and many noble Perſons be degraded; which would bring a Burden upon the Crown and Nation, and darken the Luſtre of the Peerage, to the Reproach of this Part of the Iſland. And what Effect ſuch Deciſion will have upon the Family of *Fraſer* of *Lovat*, will beſt appear to the Lords, on reading the ſhort Memorial referred to *.

* *Vide* Memorial for thoſe of the Sirname of Fraſer.

In reſpect whereof, &c.

CH. ARESKINE.